

1 Following an initial round of motions to dismiss, an appeal to and remand from the Ninth
2 Circuit, the filing of Plaintiffs' Amended Complaint (#35), dismissal of that Complaint with leave
3 to amend (#51), and the filing of Plaintiffs' Second Amended Complaint, only one claim remains: a
4 claim for relief by LaGrange, as guardian ad litem of Martinez's minor daughter Alize, against
5 Hatcher for violation of the minor's Fourteenth Amendment due process right to familial
6 association with Martinez.

7 Defendants filed their Second Motion to Dismiss on July 31, 2012. Plaintiffs' response was
8 originally due August 17, 2012. On August 20, 2012, Plaintiffs filed an unopposed motion to
9 extend time for their response (#56), which the court granted (#57). Plaintiffs then had until
10 September 11, 2012 to file their response. On September 17, 2012—having failed to file a timely
11 response—Plaintiffs again moved to extend time for their response (#59). Defendants opposed this
12 motion (#60).

13 **II. Discussion**

14 Under Local Rule 7-2(d), “[t]he failure of an opposing party to file points and authorities in
15 response to any motion shall constitute a consent to the granting of the motion.” Failure to file such
16 points and authorities is a proper ground for dismissal. *Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir.
17 1995). However, before dismissing the action, the court must weigh “(1) the public's interest in
18 expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of
19 prejudice to the defendants; (4) the public policy favoring disposition of cases of their merits; and
20 (5) the availability of less drastic sanctions.” *Id.* The first two factors generally weigh in favor of
21 dismissal, while the fourth factor weighs against it. *Wanderer v. Johnston*, 910 F.2d 652, 656 (9th
22 Cir. 1990). Therefore, courts focus on prejudice and the availability of lesser sanctions. *Id.* While
23 dismissal is indeed a harsh penalty, it is appropriate when the plaintiff fails to prosecute the case
24 with “reasonable diligence.” *See Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976).

25 Here, Plaintiffs' counsel avers that he was “intense[ly] prepar[ing]” for a disciplinary
26 hearing in front of the Nevada State Bar that was to take place on September 13, 2012, and he

1 “forgot to seek additional time . . . with the intensity of [his] focus on the Bar matter.” (Plaintiffs’
2 Motion to Extend Time #59.) This constitutes “excusable neglect” under Local Rule 6-1 (governing
3 motions to extend time after expiration of the specified period for such motions).

4 On the other hand, Plaintiffs’ failure to file responsive points and authorities along with the
5 motion to extend time—and the continuing failure to file such points and authorities up to the
6 present—does not comport with “reasonable diligence.” Moreover, the third and fifth *Ghazali*
7 factors, prejudice and the availability of lesser sanctions, are identical to those present in *Ghazali*
8 itself. Thus, under *Ghazali*, dismissal is appropriate.

9 Balancing Plaintiffs’ counsel’s excusable neglect with his failure to exercise reasonable
10 diligence, the court finds that dismissal without prejudice is the appropriate remedy. This remedy
11 penalizes further failures to prosecute while not entirely discounting the possibility of a decision on
12 the merits.

13 IT IS THEREFORE ORDERED that Defendants’ Motion to Dismiss (#55) is GRANTED.
14 Plaintiffs’ Second Amended Complaint (#52) is DISMISSED without prejudice.

15 IT IS FURTHER ORDERED that Plaintiffs’ Motion for Extension of Time (#59) is
16 DENIED as moot.

17 IT IS FURTHER ORDERED that Plaintiff shall have ten (10) days in which to file an
18 amended complaint.

19 IT IS SO ORDERED.

20 DATED this 23rd day of February, 2013.



LARRY R. HICKS
UNITED STATES DISTRICT JUDGE